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Deepanraj a/l Subramanian v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–273–11 OF 2012
BALIA YUSOF, ROHANA YUSUF AND ZAKARIA SAM JJCA
19 DECEMBER 2014

C *Criminal Procedure — Charge — Amendment — Court amended charge from murder to culpable homicide not amounting to murder at end of prosecution's case — Whether evidence showed there was 'sudden fight in the heat of passion upon a sudden quarrel' negating intention to kill — Whether following amendment accused had opportunity to exercise rights to recall or re-summon witnesses pursuant to s 162 of the Criminal Procedure Code — Whether evidence of accused's witnesses failed to support defence of self defence — Whether discrepancies in evidence of two prosecution witnesses who saw accused stabbing deceased not material enough to discredit their testimonies — Whether sentence neither wrong in law nor manifestly excessive or inadequate*

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E

The appellant was charged in the High Court with committing murder but at the end of the prosecution's case, the court amended the charge to culpable homicide not amounting to murder and after hearing the appellant's case, found him guilty on the amended charge and sentenced him to 20 years' jail for causing a man's death by stabbing him in the heart with a knife. In his instant appeal against conviction and sentence, the appellant argued, inter alia, that the trial judge erred in amending the charge after finding that there was 'a sudden fight in the heat of passion upon a sudden quarrel'. The appellant further contended that, contrary to s 162 of the Criminal Procedure Code ('the CPC'), he did not have an opportunity to recall or re-summon and examine – with reference to the amendment to the charge – any witness who had already been examined and to also call further material evidence. Among the other grounds of appeal, the appellant contended that the trial judge failed to: (a) consider the defence's evidence that he had merely acted in self defence; and (b) act with caution in accepting the evidence of two prosecution witnesses, SP4 and SP5, who said they saw him stabbing the deceased as they were interested witnesses and a finding should have been made as to their credibility.

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I **Held,** dismissing the appeal and affirming the conviction and sentence:

(1) The evidence before the trial court necessitated the amendment of the charge to culpable homicide under s 304(a) of the Penal Code. No error was committed by the amendment of the charge. The trial court had also rightly dealt with the law on culpable homicide. The procedure under s

180 of the Criminal Procedure Code was complied with in finding that a prima facie case under s 304(a) of the Penal Code was made out against the appellant (see paras 49–50).

(2) The appellant was represented by counsel and it was the appellant's choice to give evidence on oath. He called six witnesses in support of his defence. Until the very end, after his seventh witness was called, no indication or request was made by the appellant or his counsel to exercise his rights under s 162 of the CPC. Without asking, the appellant could not cry foul and now say he was denied of his rights. If the appellant had managed to call six witnesses, there was no reason why he could not recall and re-summon any of the witnesses had he asked for it. It was his failure and not the trial judge's. In any event, no prejudice was caused to the appellant (see paras 57 & 59).

(3) The trial judge undertook a detailed examination of the issue of self defence put forward by the appellant and made a finding that that defence was not available to him. There was more than ample evidence to support the findings of the trial judge. He rightly concluded that the evidence of the defence witnesses merely confirmed the altercation that occurred at the car park, that a knife was used by the appellant and that by the appellant's own admission he threw the knife which he had used against the deceased. There was nothing erroneous about the said finding with which this court concurred (see paras 9 & 11–13).

(4) The trial judge had evaluated the evidential value of SP4's and SP5's evidence in finding that a prima facie case of culpable homicide had been made out. While the evidence of interested witnesses must be treated with caution, there was no rule of law that required a trial judge to caution himself and make a specific ruling or finding on the credibility of such witnesses. Discrepancies between the evidence of SP4 and SP5 in the narration of the incident that took place on that fatal night were not of such consequence as to totally discredit their evidence. There was no rule of law that the testimony of a witness must either be believed in its entirety or not at all (see paras 26, 28, 30 & 35).

(5) The sentence imposed on the appellant was neither wrong in law nor manifestly excessive or inadequate based on the facts and circumstances of the case (see para 72).

[Bahasa Malaysia summary

Perayu telah dituduh di Mahkamah Tinggi kerana melakukan pembunuhan tetapi di akhir kes pendakwaan, mahkamah telah meminda pertuduhan kepada homisid salah tidak sehingga membunuh dan selepas mendengar kes perayu, didapati dia bersalah atas pertuduhan pindaan itu dan menhukumnya 20 tahun penjara kerana menyebabkan kematian seorang lelaki di jantungnya dengan pisau. Dalam rayuannya ini terhadap sabitan dan hukuman, perayu

A berhujah, antara lain, bahawa hakim perbicaraan telah terkhilaf dalam meminda pertuduhan selepas mendapati terdapat 'a sudden fight in the heat of passion upon a sudden quarrel'. Perayu selanjutnya berhujah bahawa, bertentangan s 162 Kanun Tatacara Jenayah ('KTJ'), dia tidak diberi peluang untuk memanggil semula atau menyaman semua dan memeriksa – B berdasarkan rujukan kepada pindaan pertuduhan – mana-mana saksi yang telahpun diperiksa dan juga untuk selanjutnya memanggil untuk keterangan material. Antara alasan rayuan yang lain, perayu berhujah bahawa hakim perbicaraan telah gagal untuk: (a) mempertimbangkan keterangan pembelaan bahawa dia hanya bertindak untuk mempertahankan diri; dan (b) bertindak C dengan berhati-hati dalam menerima keterangan dua saksi pendakwaan, SP4 dan SP5, yang menyatakan mereka telah melihat dia menikam si mati kerana mereka adalah saksi-saksi berkepentingan dan satu penemuan patut dibuat berhubung kebolehpercayaan mereka.

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Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Keterangan di hadapan mahkamah perbicaraan memerlukan pindaan pertuduhan kepada homisid salah di bawah s 304(a) Kanun Keseksaan. Tiada kesilapan telah dilakukan dengan meminda pertuduhan. E Mahkamah perbicaraan juga betul dalam mengendalikan undang-undang berhubung homisid salah. Prosedur di bawah s 180 Kanun Tatacara Jenayah telah dipatuhi dengan mendapati bahawa satu kes prima facie di bawah s 304(a) Kanun Keseksaan telah dibuktikan terhadap perayu (lihat perenggan 49–50).

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(2) Perayu telah diwakili oleh peguam dan ia adalah pilihan perayu untuk memberikan keterangan atas sumpah. Dia telah memanggil enam saksi untuk menyokong pembelaannya. Sehingga akhir, selepas saksi ketujuhnya dipanggil, tiada tanda atau permintaan telah dibuat oleh G perayu atau peguamnya untuk menggunakan haknya di bawah s 162 KTJ. Tanpa meminta, perayu tidak boleh mengadu dan kini menyatakan dia dinafikan haknya. Jika perayu dapat memanggil enam saksi, tiada sebab kenapa dia tidak boleh memanggil semula dan meminta semula mana-mana saksi yang dipintanya. Ia adalah kegagalannya dan bukan H hakim perbicaraan. Dalam apa pun keadaan, tiada prejudis telah disebabkan terhadap perayu (lihat perenggan 57 & 59).

(3) Hakim perbicaraan melakukan pemeriksaan teliti tentang isu mempertahankan diri yang dikemukakan oleh perayu dan membuat penemuan bahawa pembelaan tersebut tidak sedia ada kepadanya. I Terdapat lebih daripada keterangan yang mencukupi untuk menyokong penemuan hakim perbicaraan. Beliau telah memutuskan sewajarnya bahawa keterangan saksi-saksi pembelaan hanya mengesahkan penukaran yang berlaku di tempat letak kereta, bahawa sebilah pisau telah digunakan oleh perayu dan bahawa melalui pengakuan perayu

sendiri dia telah membuang pisau yang digunakannya terhadap si mati. Tiada apa-apa yang silap tentang penemuan tersebut yang telah diterima oleh mahkamah ini (lihat perenggan 9 & 11–13).

(4) Hakim perbicaraan telah meneliti nilai keterangan pada keterangan SP4 dan SP5 dalam mendapati bahawa kes prima facie berhubung homisid salah telah dibuktikan. Manakala keterangan saksi-saksi yang berkepentingan hendaklah diterima dengan berhati-hati, tiada rukun undang-undang yang menghendaki hakim perbicaraan memberi amaran kepada dirinya sendiri dan membuat keputusan atau penemuan spesifik berhubung kebolehpercayaan saksi-saksi. Percanggahan antara keterangan SP4 dan SP5 dalam menyatakan kejadian yang berlaku pada malam yang malang itu tidak mengakibatkan keterangan mereka tidak diterima langsung. Tiada rukun undang-undang bahawa testimoni saksi perlu dipercayai secara keseluruhan atau tidak langsung (lihat perenggan 26, 28, 30 & 35).

(5) Hukuman yang dikenakan ke atas perayu tidak salah dari segi undang-undang atau agak melampau atau tidak mencukupi berdasarkan fakta dan keadaan kes (lihat perenggan 72).]

Notes

For cases on amendment, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 1392–1394.

Cases referred to

Ashmore v Corp of Lloyd's [1992] 2 All ER 486, HL (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chacko Mathai v State of Kerala AIR 1964 Ker 222, HC (refd)
Ganapathy a/l Rengasamy v PP [1998] 2 MLJ 577, FC (refd)
Hanafi bin Mat Hassan v PP [2006] 4 MLJ 134; [2006] 3 CLJ 269, CA (refd)
Liew Kaling & Ors v PP [1960] 1 MLJ 306b, CA (refd)
Lim Boon San v PP [1968] 2 MLJ 45 (distd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 1 CLJ Rep 311, SC (refd)
Ng Terk Chai v PP and other appeals [2013] 2 MLJ 375; [2013] 4 CLJ 342, CA (distd)
PP v Ngoi Ming Sean [1982] 1 MLJ 24 (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)
Pie bin Chin v PP [1985] 1 MLJ 234; [1983] CLJ Rep 703 (refd)
Rex v Low Toh Cheng [1941] 1 MLJ 1 (refd)
Rozmi bin Yusof v PP [2013] 5 MLJ 66, CA (refd)
Srichand K Khetwani v State of Maharashtra 1967 AIR 450, SC (refd)
Tan Kim Leng & Anor v Chong Boon Eng & Anor [1974] 2 MLJ 151, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
Evidence Act 1950 s 114(g)
Criminal Procedure Code ss 162, 180, 182A, 308, 422
Penal Code ss 302, 304, 304(a), 392, 397

Appeal from: Criminal Trial No 42B-7 of 2011 (High Court, Johor Bharu)

Ranjit Singh Sidhu (Ranjit Singh Sandhu & Co) for the appellant.
Andy Razalijaya (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Balia Yusof JCA:

INTRODUCTION

[1] The appellant was charged for the murder of one Karinathan a/l Ananthasegaran under s 302 of the Penal Code. At the end of the prosecution case, the learned trial judge amended the charge to one under s 304(a) of the Penal Code and ordered the appellant to enter his defence. At the close of the defence case, the appellant was found guilty under the amended charge and was sentenced to an imprisonment for a period of 20 years with effect from the date of his arrest.

[2] Dissatisfied with the said conviction and sentence, the appellant now appeals to the court of appeal.

FACTS

[3] The brief facts of the case as unfolded in the prosecution case may be stated as follows. On 21 August 2010 at about 10pm SP4 the father of the deceased, was informed that his son, Thevandran, was involved in an accident and was brought to the Sultanah Aminah Hospital. Later at the hospital, together with his brother-in-law, Ramesh, SP4 went to the car park to smoke and saw the deceased talking to a group of Indian men. SP4 recognised that among these men, were SP5 and the appellant.

[4] SP4 saw there was pushing and shoving between the deceased and the appellant who was described as being long haired, shoulder length. SP4 went over to investigate and saw the appellant stabbing the deceased with a knife. SP4 took a rubbish bin to hit the appellant and was injured in the process. The injury to SP4's arm was caused by the appellant brandishing the knife against him. SP5 stated in a similar vein that he saw the appellant stabbing the deceased a few times using a knife.

[5] The medical evidence tendered by the prosecution shows that the deceased suffered multiple stab wounds and the fatal injury was a stab wound to the heart. The deceased also suffered other stab wounds on his shoulder, left abdomen and left chest.

THE APPEAL

[6] In advancing his appeal, the appellant had put forth a multitude of reasons attacking the decision of the learned trial judge. We append below the list of issues raised by the appellant's learned counsel in his written submissions. They are as follows:

(a) *beban pembuktian di atas kes pembelaan*;

(b) eksh P8A(1);

(c) *analisa* DNA;

(d) *corak dan cara kecederaan*;

(e) *percanggahan material*;

(f) *penyiasatan tidak lengkap*;

(g) *saksi-saksi berkepentingan*;

(h) *pertuduhan pindaan*;

(i) *gagal mematuhi* s 162 Kanun Tatacara Jenayah;

(j) *kes melampaui keraguan munasabah*;

(k) speaking judgment; and

(l) *hukuman*.

[7] We will deal with the issues raised, some of which may be dealt with collectively.

BURDEN OF PROOF ON THE DEFENCE AND BEYOND REASONABLE DOUBT

[8] On the first issue learned counsel submitted that the learned trial judge had failed to consider the evidence tendered by the defence witness that, the appellant did not stab the deceased but merely brandished the said knife. The appellant grabbed the knife from the deceased in self defence. He further submitted that the evidence of SD4 has been totally disregarded by the learned trial judge. The defence accordingly had raised a reasonable doubt and the appellant ought to have been acquitted and discharged.

[9] It ought to be said that the issue raised by the appellant touches on a finding of fact made by the learned trial judge. We will always be slow to interfere on the findings of facts made by a trial judge. We are satisfied that there is no merit at all in the submissions of learned counsel on the issue raised. We have perused the grounds of judgment as contained in *rekod rayuan tambahan* 1 and we are satisfied that the learned trial judge had dealt with the issue of selfdefence put forward by the appellant and had undertaken a detailed examination of learned counsel's submission on the issue of the knife exh P8A(1) as raised by the appellant (see pp 11–12 of *rekod rayuan tambahan* 1).

[10] His Lordship had also rightly dealt with the law on self defence and had quoted *Chacko Mathai v State of Kerala* AIR 1964 Ker 222 and *Public Prosecutor v Ngoi Ming Sean* [1982] 1 MLJ 24 as reference on the appellants' right to self defence.

[11] In our view, there is more than ample evidence that supports the findings of the learned trial judge. His Lordship had rightly concluded that the evidence of the defence witnesses merely confirmed the altercation that occurred at the car park and that a knife was used by the appellant and by the appellant's own admission he threw the knife which he had used against the deceased.

[12] The learned trial judge had made a finding that self-defence was not available to the appellant. At p 16 of the *rekod rayuan tambahan* 1, it was stated:

> Melalui keterangan saksi-saksi didapati perbuatan OKT tidak terjumlah kepada pembelaan ini. Ini adalah kerana tiada keterangan yang menunjukkan OKT telah diserang. Keterangan menunjukkan kecederaan yang dialami oleh OKT dan adiknya adalah terjadi akibat pergelutan yang berlaku ketika SP4 dan SP5 cuba menghalang OKT daripada menikam si mati. Fakta ini diakui oleh SP4 bahawa dia telah mengambil tong sampah yang berada di sana dan memukul OKT.
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> Selain daripada itu, berdasarkan kepada Laporan bedah siasat (P7) terdapat 4 kesan tikaman pada jasad mayat simati. Ini menunjukkan OKT telah menikam simati beberapa kali walaupun tanpa niat membunuh. Oleh itu tidak wujud lagi pembelaan Pertahanan Persendirian dan keperluan dalam suasana tersebut yang melayakkan OKT bersandar kepada pembelaan tersebut. Keadaan diburukkan lagi apabila SP4 dan SP5 turut dicederakan oleh OKT. Ini menunjukkan bahawa kecederaan-kecederaan yang dikenakan terhadap simati adalah berlebihan daripada imbangan kecederaan yang dibenarkan.

[13] We do not find anything erroneous about the said finding and concur with the learned trial judge.

[14] It was erroneous on the part of learned counsel to suggest that the learned trial judge had misdirected himself on the issue of burden of proof on the defence.

[15] We have perused the grounds of judgment and noted that the learned judge in assessing the defence at the conclusion of the case, had deliberated on s 182A of the Criminal Procedure Code ('the CPC') and considered the authorities of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 1 CLJ Rep 311, *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85, *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16 and *Liew Kaling & Ors v Public Prosecutor* [1960] 1 MLJ 306b. In our view, that speaks volumes about burden of proof and beyond reasonable doubt.

EXHIBIT P8A(1) DNA ANALYSIS

[16] Both SP4 and SP5 were unable to identify the knife (exh P8A) in court. Because of this, learned counsel submitted that there was a doubt as to who used the said knife and where it came from. Learned counsel also questioned how the DNA of the deceased was found on the said knife. Learned counsel went on to speculate that other individuals could have used the knife to stab the deceased.

[17] We find this line of argument by learned counsel to be totally lacking in merit. Counsel should refrain from making submissions merely based on speculations and conjectures. It would have come about either because learned counsel had failed to go through the records of appeal and carefully read the notes of evidence, or simply was pursuing the case of his client without regard to the truth and the evidence before the court.

[18] We are constrained to say that counsel appearing before the courts must render every assistance to judges in the business of dispensing justice. In this instance, we wish to remind counsel on the observation made by Lord Templeman in *Ashmore v Corp of Lloyd's* [1992] 2 All ER 486. This is what His Lordship had to say at p 493 on the issue we raised above:

> The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological, brief and consistent pleadings which define the issues and leave the Judge to draw his own conclusions about the merits when he hears the case. It is the duty of the counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination. In *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1990] 2 All ER 947 at p 959; [1991] 2 AC 249 at pp 280–281, I warned against

proceedings in which all or some of the litigants indulge in over-elaborating causing difficulties to judges at all levels in the achievement of a just result.

[19] We have considered the evidence of SP4 and SP5 relating to the knife. We have also considered the evidence of SP6, the police officer who recovered the knife near the scene of the crime. SP9 the chemist, who did tests on the same found traces of blood with the DNA of the deceased on it. We failed to understand what the issue really is with the knife. The appellant himself had admitted that a knife was used. We found learned counsel's submissions to be preposterous. We need not dwell any further on the issues.

[20] On the DNA evidence given by the chemist (SP9), it was submitted that it has no evidential value because of the way SP9 gave her evidence. It was not explained how she was able to extract DNA sampling from the exhibit. *Hanafi bin Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134; [2006] 3 CLJ 269 was cited in support of this submission as to how an expert gives evidence on DNA in court.

[21] Having perused the grounds of judgment we do not seem to be able to find anything at all being said by the learned trial judge on this DNA evidence, although much was said about the knife being used as the weapon of offence. Be that as it may, considering the totality of the evidence, we are of the considered view that even without this piece of evidence, there were still ample evidence proving the use of the knife in the instant case. For that matter, even if the knife was not found or produced, does it mean that an offence such as this could not be established by the prosecution? The failure of the learned trial judge to address his mind on the DNA evidence in our view is of no consequence to the outcome of the case.

DISCREPANCIES IN EVIDENCE

[22] Speaking of discrepancies in the evidence of witnesses, the pertinent question that merits consideration is whether the discrepancies in the evidence are so material as to affect the prosecution's case. It was submitted that the evidence of SP4 and SP5 is contradictory to one another in describing the use of the knife by the appellant. According to learned counsel, this contradiction gives rise to two or more versions of the prosecution's case.

[23] It must always be borne in mind that not all discrepancies are material. Human faculties vary and the power of retention varies among individuals. Again, one's perception of a particular fact or event may also vary from others and more so over a period of time. No two witnesses can remember the same thing and give the same recollections accurately. In his submissions, learned

counsel seems to have picked up every minor discrepancy in the evidence of the witnesses to bolster his argument. We find this to be undesirable.

[24] In *Pie bin Chin v Public Prosecutor* [1985] 1 MLJ 234; [1983] CLJ Rep 703, Wan Yahya J had this to say:

> Discrepancies are no doubt present in this case, as they do ostensibly appear in most cases in evidence of witnesses for the prosecution as well as the defence. The transcripts of most evidence, when thoroughly tooth-combed by any able lawyer, never failed to yield some form of inconsistencies, discrepancies or contradictions but these do not necessarily render the witness's entire evidence incredible. It is only when a witness's evidence on material and obvious matters in the case is so irreconcilable, ambivalent or negational that his whole evidence is to be disregarded.

[25] The learned trial judge had considered the evidence of these witnesses and had accepted their evidence. He was in the best position to assess and either to receive or reject their evidence. Although nothing was mentioned in his grounds of judgment about demeanour, we take it that His Lordship had accepted their evidence and had acted on that evidence. We shall not differ. We do not find the discrepancies referred to by learned counsel as material discrepancies. We only see one version of the prosecution's case, not two or more as submitted by learned counsel.

[26] In the same vein, we do not consider the discrepancies in the narration of the actual incident that took place on that fatal night to be of much consequence as to totally discredit the evidence of both SP4 and SP5. There is no rule of law which states that the testimony of a witness must either be believed in its entirety or not at all. The matter is entirely in the hands of the learned trial judge and this court will always be slow and reluctant to interfere unless for a very good reason, which we find none in the instant case.

INTERESTED WITNESSES

[27] Learned counsel for the appellant submitted on another aspect of the evidence which the learned trial judge had failed to consider. He contended that, both SP4 and SP5 are interested witnesses. SP4 was the father of the deceased, while SP5 was his friend. A number of authorities were referred to us supporting the proposition that evidence of interested witnesses should be treated with caution (*Rozmi bin Yusof v Public Prosecutor* [2013] 5 MLJ 66, *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805 and *Lim Boon San v Public Prosecutor* [1968] 2 MLJ 45). It was further contended that the learned trial judge had also failed to make a finding as to the credibility of the two said witnesses.

[28] While we may agree with learned counsel that there is nothing in the grounds of judgment to indicate that the learned trial judge had 'treated' SP4 and SP5 as interested witness, the fact remains that, His Lordship had certainly acted and evaluated the evidential value of their evidence. This, we say so because, the learned trial judge had in amending the charge to one under s 304 of the Penal Code found some discrepancies and inconsistencies in their evidence. His Lordship had found there was a lot of confusion during the commotion. At least they were six to seven people from the deceased's group as stated by SP13, the investigating officer, while SP4 at one stage during cross-examination stated during the altercation there were about 15–20 people.

[29] To say that the learned trial judge had not realised or was unaware of the relationship between the deceased with SP4 and SP5 is merely to deny the obvious.

[30] We have considered the list of authorities on this issue and we conclude that while the evidence of interested witnesses must be treated with caution, there is no rule of law requiring the trial judge to caution himself and make a specific ruling or finding on the credibility of such witnesses.

[31] The case of *Lim Boon San v Public Prosecutor* [1968] 2 MLJ 45 referred to by learned counsel merits our comments. Raja Azlan Shah J (as His Highness then was) had made the following remarks:

> At the very highest, I consider him as a witness having a purpose to serve, and therefore the warning against uncorroborated evidence should be given. However, in the final analysis, the rule being only a rule of practice, each case must be looked at in the light of its own facts and that, if there be clear and convincing evidence to such an extent that an appellate court is satisfied that no miscarriage of justice has arisen by reason of the omission of the direction, the court will not interfere (see *R Prater* [1960] 1 All ER 298 and *R Stannard* [1964] 1 All ER 34).

[32] The headnote to the said case states as follows:

> Held:
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> (3) where a witness may be regarded as having a purpose of his own to serve, the judge must direct his mind on the danger of convicting on the uncorroborated evidence of such witness; but if there is clear and convincing evidence to such an extent that an appellate court is satisfied that no miscarriage of justice has arisen by reason of the omission of direction, the court will not interfere.

[33] It was submitted in that case, the witness PW3 was an accomplice but the court found that at the very highest, he was a witness having a purpose to serve and therefore the warning against uncorroborated evidence should be given.

[34] In our view the said case is clearly distinguishable from the case before us. Both SP4 and SP5 are nowhere near as an accomplice and they can never be equated with the witness PW3 in *Lim Boon San* who had a purpose of his own to testify in the way he did. Furthermore we are not satisfied that there was a miscarriage of justice in the instant appeal.

[35] Call it whatever, (learned counsel had submitted the judgment to be a non-speaking judgment) we found the learned trial judge had in his grounds of judgment scrutinised both the evidence of SP4 and SP5 quite extensively in finding that a prima facie case of culpable homicide under s 304 of the Penal Code was made out. In our view, it is a reflection of the learned trial judge's evaluation and assessment of the evidence not only that of SP4 and SP5 but also the totality of the evidence led by the prosecution. Lest we forget, altogether thirteen witnesses were called by the prosecution to prove its case.

[36] In the upshot, we do not consider the issue of SP4 and SP5 being interested witnesses can change the fate of the appellant in this appeal.

INCOMPLETE INVESTIGATION AND CHAIN OF EVIDENCE

[37] Grounds No 12 and 14 in the appellant's petition of appeal read as follows:

> 12. Yang Arif Tuan Hakim Yang Bijaksana yang mendengar kes ini telah terkhilaf dari segi undang-undang dan fakta kes apabila gagal memutuskan mengenai kegagalan pegawai penyiasat mengambil kesan cap jari pada pisau yang digunakan.
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> 14. Yang Arif Tuan Hakim Yang Bijaksana yang mendengar kes ini telah terkhilaf dari segi undang-undang dan fakta kes apabila gagal memutuskan mengenai penyiasatan kes ini telah tidak dijalankan dengan secara terperinci dan menyeluruh. Siasatan yang dijalankan oleh pegawai penyiasat (SP13) amat tidak memuaskan.

[38] These two grounds were taken up together with grounds No 8 and 17 which read:

> 8. Yang Arif Tuan Hakim Yang Bijaksana yang mendengar kes ini telah terkhilaf dari segi undang-undang dan fakta kes apabila gagal memutuskan terdapat lompang dalam kes pendakwaan mengenai corak dan cara pengendalian P8A(1) yang dimana ujian DNA dibuat selepas hamper 3 tahun.
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> 17. Yang Arif tuan Hakim Yang Bijaksana yang mendengar kes ini telah terkhilaf dari segi undang-undang dan fakta kes apabila gagal memutuskan mengenai

keterangan SP6 sebagai Forensik yang tidak mengambil langkah-langkah tegas dan terperinci bagi mendapatkan hulu P8A(1).

[39] The failure of the police to carry out proper investigation has deprived not only the prosecution but also the defence of the best and most important evidence to resolve the case. Learned counsel further submitted the failure to do so means, there was withholding or suppression of evidence favourable to the defence and thus the s 114(g) presumption ought to be invoked. We were also reminded of the passage from the judgment of the Federal Court in *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137 which states:

> The accused cannot be penalised for lack of ingenuity in police investigation depriving him of the time honoured benefit of doubt.

[40] We note that there are three investigating officers involved in this case and it has been explained that it happened because the actual investigating officer (SP13) on duty that day was away in Kuala Lumpur doing his further studies during the weekends. SP11 did the initial investigation with SP12 as the senior investigating officer in charge. Be that as it may, we fail to see how the failure to obtain finger prints from the knife and whether the knife had a handle (*hulu*) or otherwise is so material to the prosecution's case. We have dealt with the issue on the knife in the earlier part of this judgement.

[41] In *Srichand K Khetwani v State of Maharashtra* 1967 AIR 450 at p 453 the Indian Supreme Court held:

> (a) Further, an adverse inference against the prosecution can be drawn only if it withholds certain evidence and not merely on account of its failure to obtain certain evidence. When no such evidence has been obtained, it cannot be said what that evidence would have been and, therefore, no question of presuming that that evidence would have been against the prosecution under section 114(g) of the Evidence Act can arise.

[42] Another aspect of the investigation which came under heavy criticism by the appellant was the delay in sending the exhibits to the Jabatan Kimia, a delay of almost three years after the date of the incident. It was submitted that there has been a break in the chain of evidence in respect of the exhibits.

[43] We do not find any basis for this submission. At p 167 of the *rekod rayuan*, the investigating officer, SP13 had given the following explanation upon being examined by the DPP and the court:

> Soalan: Boleh tak kamu jelaskan semula, kejadian dikatakan berlaku pada 22.10.2010 dan kamu terima barang-barang kes ini daripada ASP Shahrul pada 23.8.2010? Boleh tak kamu offer some explaination to the court kenapa kamu hantar lewat ke Jabatan Kimia?

Jawab: Saya telah hantar barang kimia pertama dalam masa seminggu kalau tak silap saya. Kemudian tiada maklumbalas daripada Jabatan Kimia untuk ambil balik barang kes. Pada masa 2010 perbandingan DNA tidak dapat dibuat di Johor hanya boleh dibuat di Petaling Jaya, so pada penghujung 2011 saya telah terima satu laporan daripada DPP, sebab pada masa itu IP masih berada di DPP, terima laporan itu supaya saya hantar barang kimia tersebut kepada Jabatan Kimia untuk perbandingan DNA. Selepas dapat laporan tersebut, baru saya boleh buat semula kerja saya untuk hantar pada tahun 2012. Sebab saya dapat barang kes laporan untuk hantar DNA kepada penghujung tahun 2011.

Mahkamah: Apa maksud kamu hantar kali pertama ke Jabatan Kimia Johor tidak dapat jawapan? Adakah tidak dilakukan ujian oleh pihak Jabatan Kimia atau mereka tidak respon?

Jawab: Pada awal Jabatan Kimia hanya buat persampelan, lepas itu ia tidak akan buat DNA, masa itu Department DNA belum wujud lagi di Johor, so kita perlu tunggu laporan persampelan daripada Jabatan Kimia, selepas dapat laporan baru kita boleh rujuk laporan itu dan tengok barang-barang kes mana yang perlu dihantar ke Department DNA untuk dianalisa DNA.

Mahkamah: Jadi tujuan penghantaran pertama itu untuk sampel sahaja?

Jawab: Untuk sampel sahaja.

[44] We found the explanation to be plausible and the fact that there was a delay in obtaining the chemist report does not ipso facto create a break in the chain of evidence of the exhibits. Learned counsel was merely speculating in submitting that during the lapse of almost three years there could have been others dealing with the exhibit and that no one has come forward to explain the actual movements and whereabouts of the exhibits during that period.

AMENDMENT OF CHARGE

[45] It was contended by the appellant that the learned trial judge had erred in finding that 'there was a sudden fight in the heat of passion upon a sudden quarrel'.

[46] We do not agree with counsel's submission.

[47] At pp 9–10 of the *rekod rayuan tambahan* 1, in amending the charge to s 304(a) of the Penal Code, the learned trial judge had made the following findings:

> Selepas mengaplikasikan prinsip 'Maximum evaluation of all witnesses' di tahap penutupan kes pendakwaan ini, menilai keterangan saksi-saksi pendakwaan yang seramai 13 orang itu, meneliti kepada kedudukan 51 ekshibit-ekshibit,

menimbangkan kepada Penghujahan dari pihak-pihak dengan ini memutuskan bahawa pihak pendakwaan di tahap ini tidak berjaya membuktikan wujud suatu kes yang 'prima facie' terhadap pihak OKT di bawah Seksyen 302 Kanun Keseksaan. Seperti yang sedia dimaklumi, keadaan yang mengujudkan pengecualian seperti yang terkandung di bawah salah satu dari 5 pengecualian itu, tidak menjadikan suatu kesalahan membunuh di bawah Seksyen 302 Kanun Keseksaan.

Pengecualian keempat menyatakan: 'culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, without the offenders having taken undue advantage or acted in a cruel or unusual manner'.

Di dalam kes kita ini, keterangan saksi menyatakan insiden terjadi dengan tiba-tiba. Tiada perancangan awal di pihak OKT untuk pergaduhan, apatah lagi untuk melakukan pembunuhan. Punca pergaduhan dan tikaman bermula dari suatu insiden pertengkaran. Pergaduhan terjadi berbangkit dari suatu insiden kemalangan, cabar mencabar langsung membawa kepada pergaduhan berdarah yang berakhir dengan kematian simati.

[48] And going further, His Lordship concluded:

Berdasarkan kepada keterangan yang telah disampaikan, tidak wajar dikatakan yang pergaduhan itu sesuatu yang dirancang. Insiden itu wajar dikategorikan sebagai 'a sudden fight in the heat of passion upon a sudden quarrel'. Berpandukan kepada situasi tersebut, tindakan OKT ini terjumlah kepada 'culpable homicide not amounting to murder punishable under section 304(a)', Kanun Keseksaan. Oleh itu, juga berdasarkan kepada keterangan, hanya wujud suatu kes prima facie dibukikan terhadap OKT iaitu kesalahan 'culpable homicide not amounting to murder punishable under section 304(a).

[49] We are of the considered view that the learned trial judge had made a correct finding based on the evidence available before the court and had also rightly dealt with the law on culpable homicide. We found the learned trial judge had not committed any error in amending the charge to s 304(a) of the Penal Code. The evidence proffered necessitate the amendment of the charge.

[50] In the same vein, we are also satisfied that it is implicit in His Lordship's judgment that the procedure under s 180 of the CPC had been complied with in finding that a prima facie case under s 304(a) of the Penal code had been made out against the appellant.

FAILURE TO COMPLY WITH SECTION 162 OF THE CPC

[51] Section 162 of the CPC reads:

Recall of witness when charge altered

162 Whenever a charge is altered or added by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon

and examine, with reference to the alteration or addition, any witness who may have been examined, and may also call any further evidence which may be material.

[52] On behalf of the appellant, it was submitted that this provision had not been complied with and this is yet another error committed by the learned trial judge. We were urged to set aside the conviction on the amended charge. In support, learned counsel relied on *Ng Terk Chai v Public Prosecutor and other appeals* [2013] 2 MLJ 375; [2013] 4 CLJ 342, a decision of this court.

[53] At this juncture it would be relevant to refer to the notes of proceedings as to ascertain what actually transpired when the learned trial judge made the decision to amend the charge. We append below the notes of proceedings on 5 September 2012 which is at p 182 of the *rekod rayuan*:

5.9.2012:

Timbalan Pendakwa raya Tn Iskandar

Peguambela En. G.K. Sritharan

OKT hadir

Kes ditetapkan untuk Keputusan diakhir kes Pendakwaan.

Mahkamah:

Membacakan keputusan di akhir kes pendakwaan seperti berlampir. Suatu kes yang prima facie telah berjaya dibuktikan oleh pihak Timbalan Pendakwa Raya terhadap OKT ini dibawah Seksyen 304 (a) Kanun Keseksaan. Pertuduhan Pindaan dibaca, diterangkan dan difahami, OKT tidak mengaku salah dan mohon untuk dibicarakan. OKT akan memberi keterangan secara bersumpah dari kandang saksi.

Mahkamah:

Kes ini ditetapkan untuk Pembelaan pada jam 2.30 petang.

tt. Y.A. Dato' Abd. Halim bin Aman

Hakim

Mahkamah Tinggi Jenayah (1)

Johor Bahru

2.30 petang

Pihak-pihak seperti sebelum ini. OKT dikemukakan. Kes untuk sambung bicara di pihak Pembelaan

Peguambela:

Mohon untuk memulakan kes dengan keterangan SD1 (OKT).

SD1 : DEEPANRAJ A/L SUBRAMANIAM
25 tahun
Ditahan di Penjara Ayer Molek
Bersumpah dan memberi keterangan dalam Bahasa Tamil.

Pemeriksaan Utama:

Soalan : Pada 22.8.2010, jam lebih kurang 12.00 malam dimana kamu berada?

Jawab : Pada masa itu saya berada di rumah.

[54] Having perused the said notes, we are satisfied that an amended charge was framed, read and explained to the appellant. Further at pp 10–11 of the *rekod rayuan tambahan* I the learned trial judge had also penned the following in the grounds of judgment:

Pertuduhan dipinda seperti berikut:

Bahawa kamu pada 22 Ogos, 2010 jam lebih kurang 1.00 pagi di hadapan Wad Kecemasan Hospital Sultanah Aminah, di dalam daerah Johor Bahru, di dalam Negeri Johor, telah melakukan pembunuhan terhadap Kavimathan a/l Ananthasegara (Kad Pengenalan No. 850521-01-5347), dengan berpenetahuan bahawa tindakan kamu itu boleh menyebabkan kematian, telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 304(a) Kanun Keseksaan.

Pertuduhan Pindaan dibacakan kepada OKT, OKT masih memilih untuk dibicarakan dan memilih untuk membela diri secara keterangan bersumpah dari kandang saksi.

[55] Coming back to the case of *Ng Terk Chai v Public Prosecutor and other appeals* what had happened in that case is a totally different scenario altogether. The appeal records in that case do not show that the learned High Court judge had amended the charge to s 392 of the Penal code to be read with s 397 of the same. There was also nothing on record to show that the amended charge was read and explained to all the three accused and their pleas taken and they be given the option of recalling witnesses. Questions were also posed by the court to parties as to whether the defects are curable under s 422 of the CPC. To this, the learned deputy had conceded that the defects are not curable. Hence, the Court of Appeal set aside the conviction and sentence imposed by the learned High Court judge on the three accused persons.

[56] A very clear distinction may be made between this appeal and *Ng Terk Chai*. If at all there is an irregularity in the instant appeal, it is in respect of the lack of record to demonstrate that the appellant was allowed to recall or re-summon and examine any witness who may have been examined and the opportunity to call any further evidence which may be material.

[57] We have considered the fact that the appellant was represented by a counsel and it was the appellant's choice to give evidence on oath and called six other witnesses in support of the defence. Until the very end, after the seventh defence witness was called, no indication and no request was made by the appellant either on his own or through his counsel to avail himself of his rights under s 162 of the CPC. Without asking, the appellant cannot cry foul and now say that he has been denied of his right. If the appellant had managed to call six other witnesses, we could see no foreseeable reason as to why he could not recall and re-summon any of the witnesses, had he asked for it.

[58] We further observed and took note that the appellant did make his intention clear to the court to call at least three witnesses from among the list of witnesses offered to the defence at the close of the prosecution's case (see pp 180–181 *rekod rayuan*)

[59] In any event, we are of the view that no prejudice has been caused to the appellant. It was his own failure and not of the learned trial judge. The phrase 'shall be allowed to recall or re-summon and examine' must be taken to mean that an accused person cannot be denied of that right if he chooses to exercise that right and not otherwise.

[60] Be that as it may, again we find that s 422 of the CPC and s 60 of the Courts of Judicature Act 1964 are there to redress the issue.

NON-SPEAKING JUDGMENT

[61] Learned counsel for the appellant had labelled the judgment of the learned trial judge as a non-speaking and not a reasoned judgment. He submitted the said judgment is found to be lacking in the following issues:

(a) failure to deal with the issue of credibility of SP4 and SP5;

(b) failure to deal with the issue of whether SP4 and SP5 are interested witnesses;

(c) failure to deal with the issue of incomplete investigation;

(d) absence of the analysis on the DNA evidence found on the knife; and

(e) absence of his findings on the contradiction in the evidence of SP4 and SP5 in relation to the number of stabbings inflicted on the deceased.

[62] Upon a closer look at the reasons stated by learned counsel as listed above, we can only say that these reasons are nothing more than a mere regurgitation of the issues in the grounds of appeal. It basically boils down to

the issue on the evidence of SP4 and SP5 and incomplete investigation. We have already dealt with these issues in the preceding paragraphs of this judgment and we need say no more.

[63] Judgment writing is a matter of individual style and the need for a speaking judgment needs no emphasis. It is an elementary principle of fairness that parties must not only be given a fair opportunity of being heard, but also appraised of how and why a judge has reached his decision. Section 308 of the CPC speaks of 'grounds of decision' which means a reasoned judgment on the facts and the law and not merely the conclusion arrived at. What amounts to a speaking judgment varies from case to case. Mere regurgitation or narration of the facts and a statement of the law does not amount to a speaking judgment.

[64] Shaikh Daud JCA sitting in the Federal Court in *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577 at p 585 found the grounds of judgment of the learned judge far from satisfactory in that they do not convey a 'speaking' judgment. The judgment consists substantially of reproduction of the prosecution's witnesses' testimonies in the form of questions and answers. The learned judge failed to analyse or assess these testimonies. He merely set them out and presumably accepted them without question. He has not set out the defence of the appellant with a view to assessing it, nor has he tested the defence by comparing it with the evidence adduced by the prosecution.

[65] We may agree with learned counsel that the judgment written by the learned trial judge would be 'complete' had the learned trial judge dedicated his attention and make further comments on the nature of the evidence of both SP4 and SP5 instead of just merely glancing through their evidence very generally and in passing. A judgment need not necessarily be lengthy, however as in the instant case, where the evidence of both SP4 and SP5 stood in prominence, it is only reasonable to expect that further deliberations be made and the conclusions drawn by the trial judge be made apparent in the judgment. The absence of such deliberation and reasoning will certainly open the judgment being criticised as non-speaking.

[66] In *Tan Kim Leng & Anor v Chong Boon Eng & Anor* [1974] 2 MLJ 151 HRH Raja Azlan Shah FJ laid down:

> A judicial determination of a dispute where substantial questions of mixed fact and law arise is satisfactorily reached only if it be supported by the most cogent reasons that commend themselves to the learned judge. Recording of reasons in support of a decision of a dispute serves more purposes than one. It is intended to ensure that the decision is not the result of whim or fancy ... A party to the dispute is ordinarily entitled to know the grounds on which the learned judge has decided against him, more so, when the judgment is subject to appeal. An appellate court will then have

adequate material on which it may determine whether the facts are properly ascertained, the law has been correctly applied and the resultant decision is just.

[67] While we say that the written judgment prepared by the learned trial judge in this case may not be the best judgment, but in its totality we are satisfied that it meets the requirement of s 308 of the CPC.

[68] We did a very close scrutiny of the judgment and we are of the view that the said judgment has the basic elements and ingredients of a speaking judgment although it may not be an ideal one, so to say. By way of comparison the said judgment 'speaks' far much more than the one referred to in *Ganapathy a/l Rengasamy* and the eight lines judgment written by the judge in *Rex v Low Toh Cheng* [1941] 1 MLJ 1.

SENTENCE

[69] On sentence, the petition of appeal categorically states that the learned trial judge had erred in imposing the sentence when His Lordship had taken into account irrelevant facts, being speculative and making inferences. Paragraphs 21 and 22 of the petition of appeal reads:

> 21. Yang Arif Tuan Hakim Yang Bijaksana mendengar kes ini telah terkhilaf dari segi undang-undang dan fakta kes apabila mengambil fakta-fakta yang tidak relevan ketika menjatuhkan hukuman keatas Perayu.
>
> 22. Yang Arif Tuan Hakim Yang Bijaksana yang mendengar kes ini telah terkhilaf dari segi undang-undang dan fakta kes apabila Yang Arif Hakim telah membuat banyak spekulasi dan andaian ketika menjatuhkan hukuman ke atas Perayu.

[70] The appellant however was remorseful enough and begging for leniency when he pleaded in para 24 of the petition of appeal as follows:

> 24. Hukuman yang dijatuhkan oleh Yang Arif Hakim, Yang Bijaksana adalah terlalu berat dan dengan demikian, Perayu memohon agar hukuman penjara diketepikan dan perintah sedemikian yang lain diberi demi keadilan hendaknya.

[71] We must caution counsel to act responsibly when filing petitions of appeal on behalf of their clients. Making unwarranted and unsubstantiated statements such as what had been stated in paras 21 and 22 of the petition of appeal does not augur well for members of this honourable profession. In the course of his submission we did not even hear a word from counsel about the complaint in grounds No 21 and 22 of the petition of appeal and so too, his written submissions. And neither do we find anything in the notes of evidence

or the grounds of judgment to suggest that the learned trial judge had committed the matters complained of. Grounds No 21 and 22 of the petition of appeal are totally baseless.

[72] We have considered the sentence imposed on the appellant by the learned trial judge and having ourselves considered the plea in mitigation as it appeared in the *rekod rayuan*, we found no reason to disturb the sentence imposed on him. We are not satisfied that the sentence imposed was either wrong in law or that it was manifestly excessive or inadequate on the facts and in the circumstances of the case.

[73] We unanimously dismiss the appeal and the conviction and sentence imposed by the learned trial judge is affirmed.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar